Supreme Court U. S.
FILED.
OCT 14 1895
JAMES H. MCKENNEY,
CLERK

U. S. Supreme Court.

Jose Bregaro

vs.

The Centurion. 734

Am. Sugar Refining Co.

vs.

The Same.

Brief for N. Y. & Porto Rico SS. Co., Charterer, In Opposition to Motion of Libellants for a Certiorari.

GEO. A. BLACK,

Of Counsel.

John Polhemus Printing Co., 121 Fulton St., N. Y.

1184 from 1 to ~~396~~ 397 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of José Bregaro, libellant and appellee, against the steamship *Centurion*, her engines, &c., John Blumer & Co., claimants and appellants, and the New York and Porto Rico Steamship Company, respondent and appellant, and the American Sugar Refining Company, libellant and appellee and the Same, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of Septem-

1185 ber, in the year of our Lord one thousand eight hundred and ninety-five, and of the independence of the said United States the one hundred and ~~ninetieth~~ twentieth.

(Seal.) James G. Reed.
Clerk.

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INTRODUCTION.

Fairness of statement should be the aim of counsel presenting such an application to this Court.

The criticism is made that the petitioner's statement of the testimony is partial, incomplete and distorted.

The Circuit Court of Appeals, by the concurrent voices of all the judges, reversed the decree of the District Court—saying (fol. 1165), "Our examination of the record has led us to "**conclusions of fact** which differ from those of the "District Judge."

And again—(fol. 1169).

"If this case had been between the shipowners and charterer "alone and founded upon the liability of the charterer to "indemnify the owners against loss to cargo resulting from its

" negligence **the testimony on the part of the ship** " **would be most convincing AGAINST the the-** " **ory of the charterer's negligence** * * (fol. 1170). "The case then rests upon the conclusion to which the **trier** " may come as to the extent of the peril. The District Court " was of opinion that it was insufficient to cause properly " stowed cargo to break loose and therefore the stowage must " have been insufficient. We are **constrained,**

(Note the word—Compelled—and even *unwillingly compelled*)

to the opinion that the stowage was *affirmatively* proved " to have been proper, *that the peril was sufficient to create* " *and did create the damage to a properly stowed cargo*—and " that therefore the liability of the ship and her owners was " within an exception in the bill of lading."

And they denied a motion for a re-hearing (Record 1176–1182.)

The Circuit Court of Appeals denied the libellant's application for a stay of the mandate in this case and in doing so filed the following memorandum.

" Per Curiam: "The application to stay the mandate pending " application for certiorari is denied. Such stay is unnecessary; " in a *proper case* the Court below may stay execution or dis- " charge of security, until the application for a certiorari is " disposed of.

Application was made to the District Judge for a stay and thereupon the District Judge assumed jurisdiction to refuse to enter decrees upon the mandates and to determine that the case was a *proper one* for a stay.

Was it to be expected that human nature would do otherwise? He had been reversed *on the facts* by the Circuit Court of Appeals, and that court gives him the opportunity to say he thought it was wrong in doing so—and he seized the chance with equal avidity and vigor. Judge Brown says "The proof " of *bad* stowage, at the start, was in this case *conclusive*."

(See page 15 of Petitioner's Brief.)

The Circuit Court Judges had said (fol. 1170–1171) " We are " constrained to the opinion that the stowage was *affirmatively* " **proved** to have been proper."

"Consistency is a Jewel."

Judge Brown in the "Sintram" 64 F. R., 884, said "The "question of seaworthiness at the time of sailing was, in this "case, *wholly a question of fact*, **as it is in most cases.** "The decision of that question must depend upon the appreci- "ation by the court *of all the facts* bearing upon it."

> Note how close is the expression of the same idea by the C. C. of Ap. in this (Centurian) case (fol. 1170), "The case "then rests upon the conclusion to which the *trier may* "*come as to the extent of the peril.*"

Yet in the memorandum filed (Petitioner's Brief, p. 14), Judge Brown says: "The question of seaworthiness, sea perils "*and burden of proof* involve *questions of law* of great prac- "tical importance." Doubtless "burden of proof" is a question of law, but it is dragged by Judge Brown into association with questions which are plainly of fact.

When Certiorari Should be Granted.

This Court has laid down rules for its guidance in quite recent cases, and unless it intends to utterly depart from them, there is nothing in this case to justify the application. Charterer's counsel has on two occasions applied for certiorari in cases *really* involving important questions of law, and been refused as they were not considered of sufficient *public* importance.

In the matter of Lau Ow Bew, 141 U. S., 583, at 587 this court in speaking of the questions which should be certified to it by the C. C. of Ap. said:

"It is evident that it is solely questions of gravity and im- "portance that the Circuit Court of Appeals should certify to "us for instructions," and in determining that the writ of certiorari should issue in that case said "This branch of our juris- "diction should be exercised sparingly and with caution."

In *re* Woods, 143 U. S., 202, certiorari was denied and the Court, referring to the Lau Ow Bew case said "It was **held** "that the *power* of this Court to require a case, in which the "judgment and decree of the Circuit Court of Appeals is made "final, to be certified * * could only be properly invoked "*when questions of gravity and importance were involved.*"

In the case of Lau Ow Bew, 144 U. S., 58, the above was *reiterated.*

The Opinion of the C. C. of Ap. is reported in 66 F. R., 382, and the above extracts show that merely a question of fact was before that Court for *re-trial*, in an Admiralty appeal, where the decree is *made final*.

It must be conceded that the fact that the District Judge, dealing with the same *facts*, reached a contrary conclusion does not of itself make the case one either of gravity or importance.

Why the N. Y. & P. R. S. S. Co. Appear and Oppose.

Throughout the petition and brief of libellants are scattered disavowals, protests and semi-protests against the charterer's association with this case (Pet., 21, 22, 56, Brief, p. 7), but nevertheless, while *now* disclaiming any issue to be tried between the charterers and libellants and pointing out (Pet., 18, Brief, p. 2), *that the charterers did not answer the* **libels,** the petitioners have brought the charterers before this Court, by their notice (Pet. 5), and have kept them in the case by order for the stay *they prepared* and got Judge Brown to sign.

THIS CASE.

The "Reservations," etc., of Petitioner's Statement pointed out.

I have said in my introduction that "fairness of statement "should be the aim of counsel presenting such an application "to this Court," and I propose to point out the unfairness of what is now before this Court and in so doing show that this is not a "proper case" for a certiorari.

(**1**) In Para. 3 of the Pet. (15), the *steel* deck of the Centurion is mentioned and the statement is made, "*There are also feeder* **holes** *in the deck*." The libellants have omitted to state that these *holes* are covered by iron plates fastened by bolts (Mate Chestney, 240); that the *two*, aft of the No. 2 between deck hatch, were the only ones through which molasses *could* (in any event) get down (Mate Chestney, 611), and that they were caulked (Eng. Murray, 567), and that in fact no molasses did get down them, for none of the top tiers of sugar were damaged and no molasses went through the deck (Mate Chestney, 281);

these are significant facts when it is charged that the *place* was improper, and the statement of the *holes* without mentioning the *covers* is like giving the poison and omitting the antidote.

The Opinion of the C. of Ap., fol. 1157, says: "Whether "these holes were caulked at the time in question, need not "be determined, as *it is manifest* that they had nothing to do "with any injury to this cargo."

Libellants concede this in their Petition (Para. 9, fol. 41), where they say "The molasses from the broken casks ran down "the *scuppers*."

Compare the above with libellant's brief (IV., p. 13), where they say the deck was "*known not to be tight*."

(**2**) The Bregaro libel was for damage to his **molasses.**

The Am. Sug. R. Co. libel was for damage to their **sugar.**

In Para. 5 (18) petitioners say, speaking of the *molasses* libel, "The charterers answered the petition but not the libel and "allege that the loading of the *molasses* was under the super- "vision and with the approval of the ship's officers, and that "the damage to the **sugar** was due to the bilges becoming "choked, which was not in a condition to allow it to flow off."

In Para. 7 (29) the libellants say, "*The answer of the charter-* "*ers to petition* (Sugar Case) *of the claimants does not intimate* "*that the loss was due to a peril of the sea, but alleges that it* "*was owing to the unfitness of the ship and the misconduct of* "*the master and officers.*"

Anyone reading the two paragraphs above quoted from would gather that the charterer had not alleged *sea perils* at all.

In the charterer's answer to the Bregaro (molasses) petition will be found (Record 23) the allegation "*that during the voy-* "*age in question said steamship* **encountered unusual** "**and heavy weather** *whereby certain of said hogsheads* "*were broken and damaged*," etc.

Compare the above extract with petition (30) "Indeed, *no* "*one* claimed or pretended, *even in their pleadings*, much less "in their proofs, that the damage to the cargo was due to the "violence of a storm encountered."

Note.—See the very careful way in which the C. C. of Ap. stated the difference between the answers (Rec. 1155, 1156).

(**3**) In Para. 5 (18) libellants misstate the dates. The Bregaro answer was filed May 2 (Record, fol. 36), and the amended Sug. R. Co. answer was filed May 25 (Record, fol. 77).

The answers of the charterer were both filed Apl. 25 (Rec., 25, 66), and *before* the charterer had examined any witnesses (Rec. 365).

The criticism is made by libellants that the claimants only averred sea perils generally (Pet. 19, 29), but *why didn't libellants except, if they wanted more details?*

The shipowner expressly denied fault in stowage (Rec. 31, 72), but libellants omit a reference to this *denial* (Pet. 19).

(**4**) Libellants **assert** (Pet. 20) "*Nor did the* evidence of "the claimants which had been taken before this answer was "filed *show that the loss was due to perils of the sea*," "but "the officers testified that the weather was not extraordinary, "nor different from what they experienced on other voyages "between the same ports, *nor was any subsequent attempt* "*made to show that the loss was due to sea perils.*" * * * "(Pet. 30). "Indeed, no one claimed or pretended, even in "their pleadings, *much less in their proofs*, that the damage "to the cargo was due to the violence of a storm encountered."

This is a **very grave indictment** of the Judges of the C. C. of Ap. whose opinion stated (Rec. 1171): "We are "*constrained* to the opinion * * that the peril was sufficient "to create, and did create, the damage to a properly stowed "cargo," and who denied a motion for a rehearing, on which the libellants perseveringly reiterated all that could be found and imagined on the subject.

If justification *of the construction put upon the evidence* by the Court of Appeals is needed in this Court (and I express myself thus from a conviction that this Court will again say (as they have so often said) that that is a subject they are not called upon to deal with) it will be readily found in the record.

The Log (Rec. 205): "At 6.30 P. M. a *heavy* sea "struck the ship, heaving her on her *beam ends*."

Note.—This log was put in evidence *by consent* (Rec. 179).

Beam Ends—Smythe's Nautical Dictionary—"A ship

is said to be on her *beam ends* when she is heeled over so much on one side that her beams **approach** to a *vertical* position."

Mate Chastney says (Rec. 271), that a sudden heavy squall struck her on the port beam and threw her to starboard with a heavy **LURCH**, and (Rec. 294), that **she rolled over so that her deck was at an angle of 45° with the horizon,** and (271) when she righted she still had a list of 3 feet.

Capt. Malony (Charterer's Purser) says (Rec. 395): She **hove down** very badly and **washed her decks** and at 397 he says by heaving down he meant a **heavy lurch, nearly on her beam ends.**

Eng. Murray says (320) the **lurch** was about 6 feet over and she brought a list of 3½ feet to New York. And (605) "I "went down a ladder and very near broke my back," and (334) "it was a heavy lurching over."

Second mate Watson says (701):

"Q. When she came over on her beam ends, did she lie over "there, or did she come right back again?

"A. Yes; just looked *like a log in the water.*"

Mate Chastney says (308), speaking of the heavy *lurch*, "You would think you were **shot out of a gun**."

Capt. Watson said (99), "It was that strong a list that it *hove* "*the compasses a point.*"

(See "Heeling Error" in any work on Deviation of Compass.)

Judge Brown thought a vessel being thrown on her *beam ends* was not a sea peril.

If she didn't right and went down he would think it might be, I suppose. This is like saying a man is not sick unless he dies.

He calls it, in his memorandum on granting a stay (Lbt's Brief, p. 15), "A storm of no unusual severity in winter, and "by a lurch throwing the ship on her beam ends in only rough-"ish weather *when the ship had not been compelled to slacken* "*speed*, and *in circumstances* when a ship is not thrown on her "beam ends, if in a seaworthy *condition of stowage.*"

The above extract contains many errors.

(*a*) **Mate Chastney** says (Rec. 305), the engine was slowed down to half speed and slow—and she was put before the wind.

Second Mate Watson says (700), he heard the cargo moving "when we had this heavy *breeze*, **when we had to "lay the ship to.**"

> **Note.**—The *breeze* must have been a gale if they had to lay the ship to. The word "breeze" is the foundation of Judge Brown's idea; because the witness, in off-hand sailor fashion, says a *breeze*—the Judge takes it literally, although in the same breath the witness had added: "*when we had "to lay the ship to.*"

(*b*) No complaint was made and no evidence given attacking the method of stowage as affecting the vessel's stability, and the insinuation of Judge Brown as to the *lurch* being caused by the "*condition of stowage*" is wholly unwarranted.

The *heavy* beam sea and beam squall were abundant to cause the lurch, and they were obviously "sea perils," as much so as hurricanes or tidal waves.

(*c*) The log (204) says: "a *heavy* sea."

> **Note.**—The sea is described as *heavy*. The entry at 5 P. M. shows that there was a *strong* gale with "*heavy* squalls" (204). As the gale was *already* strong the *heavy* squalls must have been stronger. As the heavy sea which struck the ship *hove* her on her beam ends, it must have been a beam sea.

Libellants say (Pet. 32): "It is admitted that the ship was "not thrown on her beam ends; that the statement in the log "is an exaggeration and cites fols. 271 and 284."

Mate Chastney says (271):

"Q. And this threw her over on *her beam ends?* A. Yes—"to starboard—not *exactly* on her beam ends, but with a heavy "list." There is nothing at 284 about beam ends.

Capt. Maloney says (397):

"Q. You use the expression "*hearing down.*" What do "you mean by that?

"A. A heavy lurch.

"Q. That is, the vessel went over on her side very much?

"A. Yes. A *very* heavy lurch; **nearly on her beam "ends.**"

Chastney at 294 (which is probably the reference libellants intended by 284) says:

"Q. Now, when you put down, as you did at 6.30 P. M. on "the 22d, 'a heavy sea struck the ship, heaving her on her "'beam ends,' what did you mean to describe by that? A. I "meant to describe ——

"Q. Did you mean to describe that the vessel actually rolled "over so that her deck was at a big angle from the horizontal? "A. It was a big angle.

"Q. How much of an angle should you judge? A. I reckon "about 45°. We very often say on her beam ends, when it is "not.

"Q. Not actually, or literally, on her beam ends, because "you might never come up, if she got that way, but you meant "to say she made a very heavy roll. A. Very heavy—yes.

"Q. And she came right back again? A. Well, part of the "way * * * " At 303 Chastney says the *list* (as distinguished from the *lurch*), was about 3 ft. and gave them a lean over of 15°; and at 304, that they had worse weather after she got the list; "for one day we had it **very severe** afterwards" (305).

(**5**) Libellants assert (par. 8, 33), "But, in fact, the molasses "went adrift as soon as the ship moved after it had been put "on board, *and was adrift all the way from Porto Rico.*"

If the above statement was made with due consideration, if the words used were carefully selected and their meaning weighed, the gravity of the charge should call for plenary proof and all the more responsibility rests on the person using them, if they are not true.

The C. C. of Ap., say (Rec. 1168), "A day or two after the "vessel left Ponce *and was on its way to another port*, **and** "**before the cargo was all taken on board,** the "molasses casks moved, *and were examined and secured.* "This fact does not seem of especial significance for there was "no more trouble until the heavy storm of Feb. 22d."

The libellants quote 2d Mate Watson (who testified "**the** "**after end of the ship is my end of the ship**" (Rec. 712), and what Watson said had reference to stowage in the *other* end—*i. e.*, No. 2 hold), and, probably by inadvertence, omit the words following their quotation.

"Q. And it was secured, wasn't it? A. Yes, sir" (Rec. 725).

In their quotation from Chastney (Pet., p. 12, fol. 35), libellants have omitted the very material word "*perhaps*." The correct quotation is (Rec. 256), "The thing is, the molasses got "adrift—one of the casks **perhaps** got adrift and that loosens "it all."

In the opinion of the C. C. of Ap., they say (1165): "In "the original depositions which were given by the officers of "the "Centurion," the good character of the stowage was "*unanimously supported*, and there was no attack or out-"spoken criticism upon the *place* of the stowage. *It was not* "*until the supercargo had testified that the place was selected* "*by him, after making inquiries of the captain and the mates,* "*as to the tightness of the between decks, that any fault was* "*found with his selection.*"

2d Mate Watson was not examined until after the supercargo (Maloney) had testified, and on his examination by the shipowner he was asked (Rec. 712): "Q. Did you have any discus-"sion with Mr. Maloney as to the **propriety** of stowing "molasses in the between decks."

> **Note.**—Down to this point no evidence had been given nor suggestion made that the *cargo was not properly stowed* and the question itself does not call for any opinion as to the sufficiency of the stowage, but simply asks as to the "*propriety*" of stowing molasses in the between decks, yet this witness volunteers as follows:

"Q. I called the **mate's** attention one day, and said they "wasn't secured from the wing, as they ought to be, *and the* "*mate spoke to him* about it and he went down and said it was "all right."

At fol. 316, Mate Chastney had already testified:

"Q. When they were loading the vessel, *did you at any time* "*call their attention to the way they were loading?* A. No. "Q. Did you tell them to put more dunnage? A. No. Q. In "any instance? A. No. Q. Nothing of that kind happened? "A. No."

Maloney had testified and gone, and could not be recalled to contradict Watson, for he died shortly after he gave his deposition.

Some of the molasses was stowed at Ponce (Capt. Watson 139), and the Centurian proceeded from Ponce to Humacoa—to Yubacoa—to Arroyo—to Guayanilla—to Mayaguez—to Arecibo —to San Juan, and thence to New York (142).

It thus appears that after loading the molasses at Ponce, the vessel went to **seven** ports **before completing her cargo,** and this is noted in the Opinion of the C. C. of Ap. (fol. 1168).

(**6**) In libellant's brief (p. 7), it is said: "As we have seen "( ), one of the witnesses for the defence says—and truly, "that it ought to be secure against anything short of a Hurri- "cane."

The witness referred to was Stevedore Butler (732) and on his examination by charterers he said (789):

"Q. Do you anticipate, in stowing a vessel, that she is going "to get on her *beam ends?* A. **No, sir.**"

On Butler's "hurricane" statement libellants built their case. But obviously whatever his ideas of stowage might be with his 26 years' experience in the port of New York (732), they cannot be taken as the standard to apply to stowage in a West Indian Island. *There are degrees of skill in all trades*, and courts have not yet decided that a New York stevedore must be carried to foreign ports. The ship employed the best skill which could be obtained in Porto Rico and the C. C. of Ap. found "the "stowage was made by an experienced stevedore" (1159).

Lawrence vs. Minturn, 17 How., 115, Curtis, *J.* "The "master is bound to use *due diligence* and skill in stowing and "staying the cargo, but *there is no absolute warranty that* "*what is done shall prove sufficient.*"

(**7**) Libellants, in their petition (Para. 8, sub. 2, fol. 37), say "The casks destroyed were stowed in hold No. 2 between decks. "There were others in No. 3. The latter were not disturbed. "The witness, Butler, an experienced stevedore, *admits that* "*he cannot explain why the casks* in No. 2 went adrift when "those in No. 3 did not, and says that there is no satisfactory "explanation (fol. 757)."

What Butler did say was, "Q. There is no satisfactory "explanation, is there? A. No, sir. **Not that I know "of, sir.**"

Here is a point in the statements of the petition where frankness and fullness might reasonably be expected. Instead, the petition states (fol. 38), "But the reason is obvious and the in- "ference irresistible, namely, that the casks were properly "secured in the one hold and not in the other."

Compare this with the evidence.

Mate Chastney says, (269), "That hold (No. 2 between "decks) **was very difficult to stow because there "was so many stanchions.**"

Maloney testified (391), "That the space between the stan- "chions in one hold would differ from the space between the "stanchions in another hold. * * **There wasn't "room to roll a hogshead** between the stanchions in "the forward end of **No. 3** between decks, and in No. 2 "between decks there was."

Stevedore Butler said (783), "**the tiers in No. 2 were "more uniform than in No. 3.** * * There were "five hogsheads each side, *ten across.*"

"In No. 3 there were stanchions to support "them."

The above shows a difference in the construction of the different holds which abundantly accounted for the different results.

Ten hogsheads across in No. 2 means that when the ship lurched over to starboard, *nearly on her beam ends*, the starboard hogshead took the weight of nine hogsheads in No. 2, while the stanchions in No. 3 being so close together supported *half* of those there stowed.

(**8**) Libellants assert (Petition 11, Para. 4 sub., vol. 49). "The "first officer did not approve it. He characterized it as mid- "dling on his direct examination and on his cross-examination "*admitted that he at times called the stevedore's attention to* "*the insufficient* dunnage."

Let us compare this statement with Mate Chastney's evidence (Rec. 232).

"Q. (By shipowner.) Who stowed the cargo in Porto Rico? "A. I couldn't say who stowed it, because there was a steve- "dore and I couldn't say his name. Q. Did you have any- "thing to do with it? A. I had nothing to do with it. Q. Did "any of your officers have anything to do with it? A. No. Q. "Or your crew? A. No. If I saw them doing anything wrong "I used to tell them sometimes, *but I never saw them.* I never "see them doing anything, but if I wanted them to do any- "thing *in my way* I used to tell them * * (fol. 235). I knew "that I was not responsible: but still if I saw anything going "wrong about the ship, I would like to put it right * * (fol. "311). Q. (By charterer.) When you saw anything wrong "you say you would make suggestions or call attention to it? "A. If I saw them not putting dunnage enough, if I thought "the dunnage was not enough I would tell them about it. Q. "*Do you mean to say that on this voyage there was any insuf- "ficiency in the dunnage of that cargo?* A. **Oh, no** "* * (312). Q. You know how they ought to be stowed "even if they contained molasses? A. Oh, yes. Q. And from "what you saw of the dunnage by wedges or quoins or what- "ever you call them, and the beds, *were they sufficient*, ac- "cording to your experience of stowing casks? A. **Yes** (fol. "316). Q. (By lib'l'ts.) When they were loading the vessel "*did you at any time call their attention* to the way they were "loading it? A. **No.** Q. *Did you tell them to put more dun- "nage?* A. **No**. Q. In any instance? A. No. Q. Nothing "of that kind happened? A. **No**.

Upon the above and much similar evidence the C. C. of Ap. based their statement (1169):

"If this case had been between the ship-owners and the "charterers alone, and founded upon the liabiiity of the char- "terer to indemnify the owners against loss to cargo resulting "from its negligence, **the testimony on the part of the "ship would be most convincing against the "theory of the charterer's negligence**.

The law as contended for by Petitioner
(and as it is).

Rightly enough libellants contend that the burden of proving a sea peril lies on the ship-owner. (Brief, p. 2).

No one disputes it.

But libellants say "no sea peril was proved." The Court, which is the trier of the *fact*, says: "There was a sufficient "sea peril proved."

Nota Bene.—*No witnesses were examined in the presence of the District Judge.* "The causes * * were "heard upon depositions" (Opin. C. C. of Ap., 1157).

The stowage was proved to be good, and so the C. C. of Ap. found as a *fact*.

Opinion (1171). "We are constrained to the opinion "that the stowage was *affirmatively proved to have been* "*proper*."

But, say libellants (Brief, p. 3), the Court of Appeals has said:

"*The burden of proof is still upon the cargo-owner or the* "*ship-owner to establish the fact that the injury was caused* "*by improper stowage.*

The preceding and explanatory passage is suppressed (1169) viz: "It must be recollected that *the case against the* **char-** "**terer** derives no additional strength from the fact that "controversy is tripartite."

In other words the Court recognized the force of the charterer's argument that the recovery **against it** depended upon the ship-owner establishing negligence—and that the burden of proof lay on him (ship-owner). In the passage quoted by libellants the Court has associated the cargo-owner with the ship-owner in respect to giving the evidence to charge the charterer and this is misconstrued by libellants into a violation of the rule as to burden of proof between ship-owner and cargo-owner.

While charterer resisted (see in *re* N. Y. & P. R. S. S. Co., 153 U. S., 525, Record 1047), the improper coupling of its case with that of the cargo-owners—(and at this late day the latter

have also reached the conviction that it was harmful to them) it consistently insisted on the application of the rules of evidence and the rule of the burden of proof. And their **just** application has resulted in the decision now attacked.

Summary.

The question now presented is whether the petitioners have shown a proper case for a certiorari. To decide this adversely it is enough to say that no question of law is involved—and that the mere fact that three Circuit Court Judges have found the facts differently from the District Judge is no reason for a retrial of the questions of fact by this Court.

Oct. 14th. 1895.

Respectfully submitted,
GEO. A. BLACK,
Of Counsel for Charterer.

United States Supreme Court.

JOSÉ BREGARO

vs.

"THE CENTURION," HER ENGINES, &C.

AMERICAN SUGAR REFINING CO.

vs.

THE SAME.

PETITION FOR WRIT OF CERTIORARI.

MACFARLAND & PARKIN,
Proctors for Petitioners.

The Evening Post Job Printing House, New York.

United States Circuit Court of Appeals, 1

SECOND CIRCUIT.

JOSÉ BREGARO,
Libellant,

vs.

The Steamship "CENTURION," her engines, &c., JOHN BLUMER & Co.,
Claimant.

2

In the Matter of the Petition of JOHN BLUMER & Co.

vs.

THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY,
Respondent.

THE AMERICAN SUGAR REFINING COMPANY,
Libellant,

3

vs.

The Steamship "CENTURION," her engines, &c., JOHN BLUMER & Co.,
Claimant.

In the Matter of the Petition of
JOHN BLUMER & CO.

vs.

THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY,
Respondent.

Notice is hereby given that upon the amended petition of José Bregaro and of the American Sugar Refining Company, verified September 5, 1895, and upon all the pleadings and proceedings herein, we shall, on the second Monday of October, 1895, on the opening of Court on that day or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol in the City of Washington.

New York, September 5, 1895.

MACFARLAND & PARKIN,
Proctors for Petitioner.

To Messrs. CONVERS & KIRLIN,
Proctors for Claimants.
Messrs. STEARNS & CURTIS,
Proctors for Respondent.

SUPREME COURT OF THE UNITED STATES. 7

JOSÉ BREGARO,
Libellant,

vs.

The Steamship "CENTURION," her engines, &c., JOHN BLUMER & CO.,
Claimant.

8

In the Matter of the Petition of JOHN BLUMER & CO.

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In the Matter of the Petition of
JOHN BLUMER & CO.

vs.

THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY,
Respondent.

And now come José Bregaro and the American Sugar Refining Company, by W. W. MacFarland,
11 their advocate, and move this Honorable Court for a writ of *certiorari*, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all of the proceedings by them had in the suits now or lately before them, wherein José Bregaro and the American Sugar Refining Company were respectively libellant and appellee, and John Blumer & Co. claimants and appellants.

W. W. MACFARLAND,
Advocate for Petitioners.

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TO THE SUPREME COURT OF THE UNITED STATES:

The amended petition of José Bregaro and the American Sugar Refining Company for a writ of *certiorari* to the Judges of the United States Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court two certain cases in which said petitioners are respectively libellants against the steamer *Centurion*, her engines, &c., John Blumer & Son, claimants, respectfully shows:

FIRST.—At all the times hereinafter mentioned 13
the American Sugar Refining Company was a corporation organized under the laws of the State of New Jersey, and the New York and Port Rico Steamship Company was a corporation organized under the laws of the State of New York.

SECOND.—In the month of February, 1893, José Bregaro, doing business in Porto Rico under the firm name of Bregaro & Co., shipped on board the British steamship *Centurion* 250 hogsheads of molasses and 465 hogsheads of sugar to be carried to the port of New York. Bills of lading were signed therefor by the master or agents of the steamer, whereby they agreed to carry and transport the 14
said cargo to New York. The said molasses was shipped at the port of Ponce, and the said sugar at the port of Arroyo, in Porto Rico. Thereafter the said Bregaro for value endorsed and delivered the bills of lading for the said sugar to the American Sugar Refining Company, who became thereby the owners thereof. The suit of Bregaro is to recover for damage to the molasses, and the suit of the American Sugar Refining Company is to recover for damages to the sugar.

As the facts were equally relevant to both cases, they were tried together, and both are included in one record.

15

THIRD.—The steamer *Centurion* is a steel vessel, having a lower hold and a between decks, separated by a steel deck. In this deck are scupper holes with pipes running down into the bilges. There are also feeder holes in this deck for loading grain. Iron bulkheads separate the holds from the engine-room, and small sluices are cut in these at the bottom of the vessel to connect the bilges with the pumps in the engine-room. On the voyage in question the vessel carried a cargo of sugar and molasses. The greater part of the sugar, partly in bags and partly in hogsheads, was stowed in the lower hold, the molasses being

16 stowed over it in the between-decks. About 200 hogsheads of molasses were stowed in the between-decks in compartment No. 2, forward of the engine-room. They were two tiers in depth, and completely filled the whole space between the engine-room bulkhead and hatch No. 2. The remaining fifty were stowed in the between-decks in compartment No. 3, aft of the engine-room.

FOURTH.—The ship sailed from Porto Rico February 19, 1893, and arrived at New York February 26, 1893. It was then discovered that eighty-eight of the hogsheads of molasses stowed in the between-decks forward of the engine-room were broken or
17 empty; that the molasses had flowed down on the sugar beneath, and the bilges and sluices to the pumps becoming chocked, the molasses rose up in the hold, damaging the lower tier of hogsheads of sugar.

FIFTH.—The libels were filed March 9, 1893, and alleged that without any extraordinary weather, but through bad stowage, the hogsheads of molasses broke loose and caused the loss of molasses and damage to the sugar. John Blumer & Company, owners of the ship, appeared as claimants. The ship was under a time charter to the New York and Porto Rico Steamship Company, and the claimants
18 before answering filed a petition to bring in the charterer (p. 5) in order that it might be determined as between the ship and the charterer which was liable for the loss. The charterer answered the petition but not the libel, and alleged that the loading of the molasses was under the supervision and with the approval of the ship's officers, and that the damage to the sugar was due to the bilges becoming choked which were not in a condition to allow it to flow off. After the petition to bring in the charterer had been filed, but before any answers to either the petition or libel were filed, the claimants examined some of the officers and crew. Subsequently

on May 23, 1893, the answers of the claimants were 19
filed (Record, p. 23). It will be seen that no specified perils of the sea are alleged as the cause of the loss, although the claimants' testimony on this point had then been taken; there is only a general averment in these words, "owing to perils encountered on the voyage certain cases of molasses became broken," and, as to the sugar, "owing to perils of the sea encountered on the voyage, a certain part of the sugar was in contact with molasses." The charter party is set out; it is alleged that if there was fault it was on the part of the charterer, and in effect due to bad stowage. There were also suggestions made founded upon the terms of the bills of lading, but they were not followed up or 20
made a ground of decision; nor did the evidence of the claimants, which had been taken before this answer was filed, show that the loss was due to perils of the sea, but the officers testified that the weather was not extraordinary nor different from what they experienced on other voyages between the same ports, nor was any subsequent attempt made to show that the loss was due to sea perils; it was attributed to the misconduct of the charterer, and all subsequent testimony taken by the claimants was taken to establish this fact, and to relieve themselves from liability as between themselves and the charterer.

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SIXTH.—The libellants were not concerned with the relations established by the charty-party. They looked to the ship alone. The petition of the claimants and the charterer's answer raised an issue only as between those parties as to which of them was liable to make good the loss to the libellants, but no issue to which the libellants were parties. The claimants contended in their petition against the charterer that bad stowage was the cause of the loss; the charterers in their answer denied this allegation, averred that the stowage was approved by the officers of the ship, and on the

22 trial sought to prove that the ship was unfit to receive the cargo. In this collateral controversy, the libellants took no part, considering that it was the same thing as if the issues raised by the petitions and answers were the subjects of an independent suit between the shipowners and the charterers, and that their rights in the premises could not be affected by the evidence, or the decree upon such evidence. Nor did the parties to the controversy so collaterally attached to the libellants' suits at any time suggest that it in any way concerned the libellants, and the decree of the District Court treated it as a matter wholly foreign to the issue between libellants and the ship.

23 Accordingly a decree was rendered in favor of the libellants against the ship. In the controversy between the ship and the charterer there was a decree against the latter. The libellants' cases, and the contention raised between the claimants and the charterer were in the District Court treated as distinct and separate matters. But in the Court of Appeals these two proceedings, having no relations whatever to each other, were confounded, and treated as a single cause; the libellants were expressly regarded as parties to the issues raised between the claimants and the charterers upon the petition and answer; their rights were identified with the claimants, and they were treated as parties to the petition along
24 with the claimant.

Thus, the Court says in its opinion (which is in the main concerned with the issues raised between the shipowner and the charterer instead of the issues between the libellants and the ship): "It must be recollected that the case against the charterer derives no additional strength from the fact that the controversy was tripartite. The burden of proof is still upon the cargo owner or the shipowner to establish the fact that the injury was caused by improper stowage, and this burden has in our opinion been imperfectly borne." But there was in fact no case between the charterer and the libellants

nor any issues to be tried. The word "tripartite" 25
appears to be used in the sense that there was a single controversy in which three distinct parties having separate interests were severally interested; but this could not be so, because the libellants had no controversy, except with the ship and the claimants, its owners. The charterers did not answer the libels, or seek to raise any defense to the libellants' claim against the ship, nor would their relation to the case have permitted them to do so; they simply denied the allegations of the petition that the damage to the cargo was due to their misconduct; therefore, there was no burden of proof resting on the libellants to establish any fact as against the charterers, for they were as completely strangers to them 26
as if they had not been introduced into the case at all. And as between the libellants and the claimants the burden of proof by an elementary and undoubted rule of evidence rested upon the latter to account for the loss.

SEVENTH.—On the trial the libellants established their case by proving the bill of lading containing the contract of carriage and the non-delivery of the cargo according to its tenor (Transportation Co. *v.* Downer, 11 Wallace, 129). This was all the law called upon them to do, and all they could do, for, as this Court has said, the cargo owner in such cases has no means of ob- 27
taining any sure information as to the cause of the loss (*The Northern Belle*, 9 Wallace, 529), and in these cases the libellants did not and could not produce any witnesses on that point.

The ground of the decision of the Court of Appeals is that the loss was caused by the ship encountering a storm of uncommon violence; but there is no averment to this effect in the claimant's answer—no such defense is set up; and, as will be seen, all the claimant's witnesses denied that bad weather was the cause of the loss and attributed it to bad stowage.

28 All that is said in the answer in the *Bregaro* libel on this point is contained in the second paragraph of the answer, which is in the following words:

"They admit that thereafter the steamship sailed from the port of Ponce, Porto Rico, with the said molasses on board, bound for New York, where she arrived in the latter part of February, 1893, and that owing to perils encountered on the voyage certain cases of molasses became broken, and owing to the inherent vice of the molasses certain quantities of it leaked out during the passage; but they deny each and every other allegation in the second article of the libel contained" (Record, p. 10).

29 It will be seen that there is no averment as to the nature of the perils encountered. The gravamen of the answer is that the charterer is responsible for the loss, and that may well be so as between the ship and the charterer; but the fact did not concern the libellants, who looked to the ship alone for the performance of the contracts embraced in the bills of lading.

The answer of the claimants to the libel of the American Sugar Refining Company is substantially the same as above (p. 23).

The answer of the charterers to the petition of the claimants does not intimate that the loss was due to
30 a peril of the sea, but alleges that it was owing to the unfitness of the ship and the misconduct of the master and officers (p. 21). Indeed no one claimed, or pretended even in their pleadings much less in their proofs, that the damage to the cargo was due to the violence of a storm encountered.

EIGHTH.—As to the weather the evidence is as below:

I.—It appears by the log (p. 61 *et seq.*) that the ship had fine weather until the 22d of February (she arrived on the 26th, fol. 210). On Wednesday, the

22d, the molasses went adrift (fols. 204, 205). The 31
log describes the weather on that day as follows:

"WEDNESDAY, 22 day of February, 1893.

Steering compass course N. by W. Wind S. E.

A. M. Fresh breeze and cloudy.

4 A. M. Do. wind and weather. Strong head sea. Distance run, 527 knots.

8 A. M. Light breeze and cloudy. Distance run, 563 knots.

10 A. M. Wind S. W.

Noon. Increasing breeze and strong cross sea. Ship rolling heavy. Distance run, 600 knots.

4 P. M. Strong wind and sea—in staysails. Distance run, 634 knots. 32

5 P. M. Strong gale with heavy squalls of wind and rain.

At 6.30 P. M. a heavy sea struck the ship, heaving her on her beam ends, washing deck cargo adrift, and giving the ship a heavy list to the starboard. Got all hands up to secure deck cargo.

8 P. M. Distance run, 660 knots.

Midnight. Strong gale and heavy sea; wind N. W. Distance run, 682 knots.

Pumps, lights, log and lookout strictly attended to."

It is admitted that the ship was not thrown on her beam ends, that the statement in the log is an 33
exaggeration (fols. 271, 284), and that the sea which struck her and the lurch she received were no worse than she encountered subsequently on the same voyage. It was not an extraordinary occurrence (fol. 304). The molasses adrift gave the ship a list to starboard (fol. 904) of about "three strakes" (fols. 99, 293), which was maintained until arrival (fol. 99). The log mentions only "strong gale, heavy squalls and rain." This was not uncommon weather for any season of the year, and could not have sent the molasses adrift if properly stowed; but, in fact, the molasses went adrift as soon as the ship moved after

it had been put on board, and was adrift all the way from Porto Rico.

Watson, the second officer, says (fols. 723, 727) that he told the supercargo that the casks were not properly stowed, properly secured. He adds: "The night after his attention was called to it we shifted from one port to another, and the casks were moving about like that (illustrating), and so the next morning we told him about it again, and he sent his men down to secure it again" (fol. 275). Of course, the bad stowage could not be efficiently remedied without unloading and restowing, for the displacement of one cask displaced all, and moreover there was no room to work; casks filled the space (fols. 377, 393), and the casks which first got adrift were those next the engine-room bulkhead, which could not have been reached without unloading all the intervening casks (fol. 299).

The same witness says: "If one tier gets adrift, the casks in the front tier get broke; all the tiers behind that would go adrift, too" (fol. 276).

Chestney, the first officer, says: "The thing is, if the molasses got adrift, one of the cases got adrift, and that loosens it all, and it got down amongst the ship again" (fol. 256).

Butler, another witness, says: "Stowage should be such as to resist anything short of a hurricane" (fol. 790).

The mate, Watson, says, casks "were stowed securer" on the subsequent voyages "than they were at the first" (fol. 728).

The decisive fact is then proved by the claimant's own witnesses that the casks were adrift at the starting of the voyage, and necessarily remained so.

It was admitted that the shifting of cargo and not the squall caused the ship to list. The first mate, Chestney, says: "The wind and sea would not have given the list without the shifting of the cargo." * * * "The cargo had shifted or she would not have had the list I suppose" (fol. 224). We have

seen that the cargo had been adrift all the way from Porto Rico, the wind and sea merely increased the attrition of the casks, and they broke, spilling their contents and giving the ship a list. The same officer describes the appearance of the wrecked cargo the morning after the "squall" (pp. 82, 83), "nearly all the casks were loose" (fol. 268), "one confused mass" (fol. 269). 37

With the casks moving about at starting, any weather sufficient to set them at all actively in motion must have broken them, as in fact it did.

II.—The casks destroyed were stowed in hold No. 2, between-decks, there were others in No. 3; the latter were not disturbed.

The witness Butler, an experienced stevedore, admits that he cannot explain why the casks in No. 2 went adrift, when those in No. 3 did not, and says there is no satisfactory explanation (fol. 757). But the reason is obvious, and the inference irresistible, namely, that the casks were properly secured in the one hold and not in the other. 38

The *Burgundia*, 29 Fed. Rep., 607.
Marx *v.* The *Britannia*, 34 Fed. Rep., 906.

III.—Again referring to the weather, Watson, second mate, says, we had this heavy "breeze" (fol. 700), and this "breeze" at once put the cargo in motion (fols. 700, 701). 39

Chestney, the first mate, says: "It was rather a rough voyage." He declines to say it was rougher than was to be expected at that season of the year (fol. 216). Rougher after the list than before (p. 102, *et seq.*).

Murray, chief engineer, says: "I should say it was roughish weather; not what I would call very rough weather" (fol. 320). No witness asserted that the weather was uncommonly rough. Moreover, the log shows, and the witnesses say, that the weather was much worse after the cargo broke away than before. Nor does any witness intimate that

40 damage to cargo was due to the severity of the weather; indeed, the contrary is established by the fact before mentioned, that other casks, better stowed, in the same between-decks in another hold, were not disturbed at all. The ship had not slackened speed for a moment before the cargo went adrift. It follows that the conclusion of the Court of Appeals on this point is wholly unsupported by the evidence.

IV.—Deck cargo was displaced to a certain extent by the list of the ship, and, in rolling about, did some slight damage to deck furniture during the latter part of the voyage; this had no relation to the weather (fols. 154, 218, 307). "The ship, having
41 such a list, caused the deck cargo to go" (Chestney, fol. 307). "The deck cargo was the cause of all that mischief on deck" (Watson, fol. 154).

It may be repeated that all this occurred after the casks went adrift and were broken up in a "strong breeze," at the very first approach of roughish weather.

NINTH.—There were two 2 or $2\frac{1}{2}$ inch scupper pipes in the between-decks, leading into the bilges (fol. 242). The molasses from the broken casks ran down the scuppers (fol. 281), the bilges becoming clogged by the mixture of sugar with the molasses, the latter rose upon the sugar and so caused
42 the damage that was done to that.

TENTH.—The claimants having failed to allege, or even attempt to prove extraordinary violence of storm and severity of weather as a defense, nothing remained for the libellants to do; the claimants in effect submitted to a decree. But in this situation, the Circuit Court of Appeals, reversing the District Court, held as above stated, that in order to recover it was necessary for libellants to go further and affirmatively prove that the loss was caused by bad stowage, whereas the libellants supposed and were

advised that they were not called upon by law to 43
prove anything until and unless the claimants should make out a clear *prima facie* case of loss from *vis major* which the claimant did not attempt to do.

ELEVENTH.—The libellants insisting that the law did not impose upon them the duty of proving bad stowage, pointed out that bad stowage had been admitted, proved, and in fact insisted upon by the claimants, and that their petition against the charterer rested upon that proposition of fact, and this is shown to be true by the record. Attention has already been called to a part of the evidence on that point; it need not be repeated here. 44

I.—The officers of the ship positively assert that the stowage of the molasses was improper, both as to the place in which it was put and the way it was secured there (723, 726).

The vessel had never had liquid cargo between decks and it was not known to be tight. The captain objected to Maloney stowing molasses between-decks (fol. 510). He told him it was not the proper way to stow the molasses; that he could not say that between-decks was in a proper condition to stow liquid cargo; that he could not say whether it was tight or not (fol. 511). Maloney made no inquiries as to the condition of the hatches (fol. 511). The ship had never had a liquid cargo (fol. 514). He told Maloney so, and that he could not say whether between decks was tight (fol. 484). 45

The hatches leading from the between-decks to the lower hold were only covered; they were not caulked and the feeder holes were not tight (fols. (311, 567, 608).

"Maloney knew the between-decks wasn't tight. Because I asked him if he wanted those places fastened down in the between-decks, and he said no" (fol. 608).

The second officer, Watson, says, when asked if

he told Maloney that between-decks was liquid tight: "I couldn't have said they were liquid tight, when they have got these iron feeders in them and they weren't closed" (fol. 657).

III.—We have seen the cargo rolling about in a perfectly calm sea a few hours after it was laden; it never was and could not be made good stowage after that. Two hundred hogsheads of molasses, two tiers in depth, extending all across the ship, and from the bulkhead to the hatchway, completely filled the space, and without unloading no efficient re-stowage could be made, especially of those next the bulkhead which were the first to break loose (fols. 299, 377, 393, 725).

The Circuit Court of Appeals says: "This fact does not seem of special significance, for there was no more trouble until the heavy storm of the 22d February." Thus in effect deciding that it is immaterial that the stowage was bad at the outset of a voyage in a case where the Court is of opinion that good stowage would not have withstood the storm encountered. How this new rule would work in practice is shown by the fact that the casks in the adjoining hold, No. 3, which were properly stowed were not disturbed. Thus the assumption that the casks in No. 2 which were adrift at the start would have broken away even if well stowed is seen not to be well founded

IV.—Another ground of the decision of the Circuit Court of Appeals against the libellants, as appears by the opinion, is that the master and officers on their first examination unanimously approved the stowage, and when examined later disapproved it. The Court fell into error on this point; there was no conflict between the earlier and later testimony of the witnesses; the only difference was that the later testimony was more full and explicit.

As already stated the captain, first officer, engineers and one seaman were examined before

the answers were filed either to the libels or to the 49
petition. This petition alleged that the charterer was responsible for the stowage, and the witnesses were not examined at length on that point. The captain said that he knew nothing about the manner in which the cargo was stowed (fols. 124, 135, 172). The first officer did not approve it. He characterized it as middling on his direct-examination, and on his cross-examination admitted that he at times called the stevedore's attention to the insufficient dunnage (fols. 237, 317). The engineers and seaman knew nothing about the stowage of the cargo. When the charterer's answer to the petition was filed it alleged that the stowage was approved by the officers, and testimony 50
was introduced by the charterer to the effect that the molasses was placed in the between-decks, because the officers of the ship assured the stevedore that the deck was liquid tight, and the molasses could not flow down upon the sugar. To contradict this the officers were recalled and examined by the claimant as to the condition of the deck, and the stevedore's knowledge of its condition; and the second officer, who had not been previously examined at all, was called by the claimants, to prove that the decks were not liquid tight, and that the stevedore was so informed. The issue between the claimants and the charterers related to the place of stowing the molasses and the condition of this deck, and not 51
to the manner of its stowage, and the examination of the second officer was not directed to this latter point. But on his cross-examination by counsel for the libellants the admission was elicited that the hogsheads of molasses were not properly stowed, and were rolling about in calm weather before the vessel started on her voyage (fols. 723, 725). This testimony had no relation to any issue between the claimant and the charterer; it was not the testimony of a witness who had previously expressed approval of the stowage, as stated in the opinion of the Circuit Court of Appeals, and it could be of no possible

52 benefit to the claimants, either as against the libellants or as against the charterer, but was an admission by the claimants' own officer against their interest, and entitled to all the weight of such admissions. But the Circuit Court of Appeals, confounding the case of the libellants against the ship with that of the claimants against the charterer, have treated this testimony as that of a witness called on the libellants' behalf, and as an attempt of such a witness to contradict or modify testimony previously given to the contrary effect, and, assuming such contradiction to exist, have held that these witnesses were discredited thereby and that the libellants' case failed.

53

V.—As to stowing the molasses over the sugar, the master expressly condemned it (fols. 484, 510), and the authorities universally condemn the stowing of liquids over solids under such circumstances; it was never approved in any case.

VI.—Further, as to the above ground of decision: The libellants rightfully stood upon their legal rights to have delivery of cargo according to the bills of lading; they introduced no witnesses; they had none, and from the nature of the case could not have any as to the cause of the loss. They, therefore, left the claimants to make out their defense
54 if they could. If the claimants introduced no witness, the libellants would be entitled to a decree by default; if they introduced witnesses whose testimony was wholly worthless, the result would be the same, and correspondingly so far as it might be thought unreliable, just so far the defense would be weakened; the libellants being entitled as against the claimants to have every word, admission or declaration of their witnesses upon their examination taken as true, the claimants being estopped to deny its verity by an elementary rule of evidence.

But the Court denies this principle and adopts its opposite, reversing the position of the parties, and holding that if the testimony of the claimants' witnesses was insufficient to establish a defense, it is fatal to the libellants' case, and this rule is supported by the further proposition already mentioned, that in order to recover the libellants must themselves prove bad stowage; that the burden of proof was on them to do so, and for the purpose of its criticism the Court treated the claimants' witnesses as the libellants' witnesses (68 Fed. Rep., 385, 386). 55

VII.—It will be seen that the greater part of the opinions in both Courts are concerned with the controversy between the shipowner and the charterers, to which the libellants were strangers. In the District Court, however, the libellants' rights to the premises received separate and distinct consideration, but in the Court of Appeals they appear to have been identified and confounded with those of the shipowner and the charterer. If the libellants' cases had not been so complicated with collateral issues which in no wise concerned them, the decrees in their favor must have been affirmed, because the evidence exhibited no color or even pretense of defense by the claimants. 56

TWELFTH.—Your petitioners aver that this is a case in which it is proper for this Court to issue a writ of *certiorari* for the following reasons: 57

(1.) Because on the undisputed facts the loss and damage are not shown to have been due to perils of the sea, but are affirmatively shown to be due to bad stowage.

(2.) Because the Court erred in its ruling that the burden of proof was on the cargo owner to establish bad stowage.

58 (3.) Because the Court erred in its ruling that a sea peril had been encountered within the meaning of the bills of lading.

(4.) Because the evidence and admissions of the log and officers to the fact that no extraordinary weather was encountered and that the stowage was bad, were binding on the vessel and claimants, and conclusive against any claim that the loss was due to perils of the sea, and entitled the libellants to a decree.

Wherefore, your petitioners pray that this Honorable Court will be pleased to grant a writ of *certio-*
59 *rari* in these cases to the United States Circuit Court of Appeals for the Second Judicial Circuit to bring these causes before this Honorable Court, and for such other relief as may be just.

JOSÉ BREGARO.
THE AMERICAN SUGAR REFINING CO.

MACFARLAND & PARKIN,
Proctors for Petitioners.

Southern District of New York, ss.:

WILLIAM PARKIN, being duly sworn, says: That
60 he is one of the proctors for petitioners. That the foregoing amended petition is true according to deponent's information and belief. The sources of deponent's knowledge and grounds of his belief are the records in the cases and the information acquired in their conduct. Deponent further says: That José Bregaro is not a resident of the United States and is not within them, as deponent is informed and believes, and the American Sugar Refining Company is a New Jersey corporation, and

that deponent is authorized to make this verification 61
on behalf of said petitioners.

WM. PARKIN.

Sworn to before me this 5th }
day of September, 1895. }

WM. TURNER MACPHERSON,
[SEAL.] Notary Public,
N. Y. County.

I hereby certify that I have examined the foregoing petition, and that in my opinion it is well founded, and that the same is one in which the prayer of the petitioner should be granted.

W. W. MACFARLAND,
Advocate. 62

Supreme Court U. S.
FILED.
OCT 15 1895
JAMES H. McKENNEY,
CLERK

United States Supreme Court.

JOSÉ BREGARO

vs.

THE STEAMSHIP "CENTURION."

THE AMERICAN SUGAR REFINING COMPANY

vs.

THE SAME.

BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

W. W. MACFARLAND,
Of Counsel for Petitioners.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

JOSÉ BREGARO

AGAINST

The Steamship "CENTURION."

THE AMERICAN SUGAR REFINING COMPANY

AGAINST

THE SAME.

Brief in support of the Libellants' Petition for a Writ of Certiorari.

First.—The cases of the libellants rest wholly on their legal rights under the bills of lading, and the evidence introduced by the claimants; as between these parties there are no facts in dispute. They are set forth at large in the petition, as the importance of the cases and of the questions presented seemed to require. It is thought that they will arrest the attention of the Court, call for grave consideration and convincingly show that the decision reversing the District Court should be reviewed here.

No further statement of facts need be made except again to call the attention of the Court to the nature of the action and the situation of the parties. The libellants sued the ship under the bills of lading for damage to cargo. The claimants alleged that the vessel was under a time charter, and that the charterer was responsible for bad stowage, and they filed a petition against the charterer asking that their respective rights under the charter-party be determined. The charterer answered the petition, but not the libel, and claimed that the stowage was made with the approval of the officers and the loss was due to the bad condition of the ship. The Circuit Court of Appeals, confounding the case of the libellants against the ship with that of the claimants against the charterer, held that the burden of proof was on the libellants to establish bad stowage, and treated the officers and crew, though called by the claimants, as the libellants' witnesses, and held that, in so far as these witnesses were discredited, the libellants' case failed. As shown in the petition, these witnesses were not discredited, but testified consistently throughout, and bad stowage was affirmatively and conclusively proved. But aside from this question of fact, it is submitted that the Circuit Court of Appeals fell into grave error of law in its rulings on the burden of proof, and the effect to be given to this testimony, and also in its ruling that there was any evidence of a sea peril within the meaning of the bills of lading. These questions of law will now be considered.

Second.—*The burden of proof.*

I.—For centuries trade in sugar and molasses has been carried on between New York and Porto Rico. No trade route is better known to navigation. The kind of weather that may

be expected at the different seasons of the year may be predicted with certainty and guarded against efficiently. The qualities of cargo, how it is put up for shipment, how it will act on the voyage, where and how it should be stowed to insure safety—all this is well known. The result of long experience and acquired knowledge is that the cargo can and should be efficiently protected against any weather short of a hurricane, and this, as we have seen, is admitted.

II.—The Circuit Court of Appeals says in its opinion: "*The burden of proof is still upon the cargo owner or the ship owner to establish the fact that the injury was caused by improper stowage.*" Bearing in mind that these are suits by the cargo owners against the ship, founded upon the bills of lading, it is difficult to see what is meant by saying that the burden of proof was on the ship to show *bad* stowage. For, as the first step in any defense, it would be necessary that the ship should prove *good* stowage, and next show, if it could, that the *vis major* overcame its diligence.

The rule was firmly laid down by this Court in the case of the *Edwin I. Morrison* (153 U. S., p. 213). It was also laid down and applied under varying circumstances in the following cases.

1. In the *Svend* (1 Fed. Rep., 54), Judge Clifford says:

> "Carriers of goods, if common carriers, contract for the safe custody, due transport and right delivery of the same, and, in the absence of any legislative regulation prescribing a different rule, are insurers of the goods, and are liable at all events and for every loss or damage, unless it happened by the act of God, or the public enemy, or the fault of the shipper, or by some other cause or accident expressly excepted in the bill of lading, and without any fault or negligence on the part of the carrier."

2. In Propeller *Niagara v.* Cordes (21 How. U. S., 23) *the whole duty of a carrier* by sea is defined with precision:

"Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers, and liable in all events and for every loss or damage however occasioned, unless it happened by the act of God, or the public enemy or by some other cause or accident without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. A carrier's first duty, and one that is implied by law when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skillful master, of sound judgment and discretion, and, in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place temporarily, at least, in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation, as they are, in general, in respect to goods transported for hire, responsible for his acts and negligence. He must take care to stow and arrange the cargo, *so that the different goods may not be injured by each other, or by the motion of the vessel or its leakage;* unless, by agreement, this duty is to be performed by persons employed by the shipper. In the absence of any special agreement, his duty extends to all that relates to the landing, as well as the transportation and delivery of the goods, and for the faithful performance of those duties the ship is liable as well as the master and owners. A clean bill of lading in general imports, unless the contrary appear on its face, that the goods are to be safely and properly secured under deck (Bland. on Ship., Sec. 192)."

Proof of the performance of *all* these specified duties is essential to a valid defense.

3. The *Mascotte* (51 Fed. Rep., 695):

Brown, *J.*: "As respects the claim for damage to tea caused by oil, the bill of lading, as well as the master's testimony, shows that the chests were received on board in good condition. Some of the chests on delivery were, beyond doubt, oil-stained and defaced. All that the claimants can do to ex-

onerate the ship has doubtless been done; but, after all, the evidence shows nothing more than that they cannot explain how the stains and defacing occurred. It negatives certain causes that might, under some circumstance, have produced the damage, but this is not, I think, sufficient to release the ship from her legal obligation. The ship had possession and control of the goods from the time they were delivered into her custody. If the goods were received in good condition, as this bill of lading shows they were, she warrants their delivery in like condition, unless damaged through the act of God, public enemies, the dangers of the seas, or through some other excepted cause (Liverpool & G. W. Steam Co. *v.* Phenix Ins. Co., 129 U. S., 397, 437; 9 Sup. Ct. Rep., 469). *The burden of showing that the damage arose from such an excepted cause is upon the ship* (Nelson *v.* Woodruff, 1 Black, 156). As the *Mascotte's* evidence does not show this, but merely leaves the damage unexplained, I must therefore hold the ship liable for this item."

Wallace, *J.*: "We agree with the learned District Judge, who decided this cause in the Court below, that the libellants have a sufficient case for the recovery of their damages, by reason of non-delivery of their cargo in good order and condition. *The burden of proof is upon the steamship* to overcome the effect of the acknowledgment in the bill of lading of the reception of the goods on board 'in good order and condition,' and the evidence introduced on her behalf is not sufficient to overcome the effect of this recital. The decree is affirmed."

4. In the case of the *Barracouta*, 40 Fed. Rep., 499. Wallace, *J.*, says:

"When goods in the custody of a common carrier are lost or damaged, *the presumption is that the loss was occasioned by his default, and the burden is upon him to prove that it arose from a cause for which he is not responsible.* The onus, therefore, is upon the steamer to show that the present loss arose from leakage; and, *if the evidence is as consistent with the conclusion that the loss arose from negligence, the libellants are entitled to recover.*"

5. The brig *Sloga* (10 Bene., 315) is directly in point in both the facts and the law.

Choate, *J.*:

"The rule of law to be applied to this case is too well settled to require any extended comment. The ship is bound by its contract to deliver the cargo in good order and condition, unless prevented from doing so by the excepted peril. If the cargo is delivered in a damaged condition, *the burden is upon*

the ship to show that the case comes within the exception contained in the bill of lading."

6. In the case of the ship *Compta* (4 Sawyer, p. 377) Judge Hoffman states a proposition as true and simple as anything in mathematics, but it is sometimes overlooked. He says:

"The carrier to make good his defense is bound to show that the damage arose from a sea peril. *It is not enough to show that it might have arisen from that cause. He must prove that it did.*"

"The question that arises in the case before us has reference to the extent of the duty or obligation which the law imposes upon the owners of such a steamboat in regard to the condition of the barge in which grain is so carried in bulk, as to seaworthiness or fitness to perform the voyage which her owners had undertaken that she should perform safely, with the exception of the unavoidable dangers of the river and of fire.

This duty is one which must obviously belong exclusively to the carrier. He can and must know, at his own peril, the condition of the barge in which he proposes to carry the goods of other people; while the owner of the cargo is under no obligation to look after this matter, and has no means of obtaining any sure information if he should attempt it.

When we come to consider what shall constitute fitness or unfitness for the voyage, we must take into account the nature of the service which she is to perform, and the dangers attending the navigation in which she is engaged. This is very different in the narrow current and shallow water of the river from what it is in open seas or lakes or their bays and inlets."

The *Northern Belle*, 9th Wallace, 529.

III.—The fatal, pervading and confusing error of confounding the rights of the libellants and the charterer, and assuming that the former had to prove something against the latter, is obvious. It is not intimated that the complainants made a complete defense founded on the *vis major*, and so shifted the burden of proof; indeed, there is not a scintilla of evidence to bring the case within that rule. It appears by the statement of facts set out in the petition that the claimants practically allowed the case to go by default in favor of the libellants both in their pleadings and proofs. The claimants said and insisted that the stowage was bad in the

beginning; and as the log shows the ship had remarkably fine weather for the season of the year up to the moment the cargo went adrift at 3 P. M. on the 22d, giving the ship a list of about 3 feet to starboard. It is admitted in the evidence that the statement in the log that the ship was thrown on her beam ends was an exaggeration, and that this sea and the lurch or heave which she received were no greater than she encountered subsequently on the same voyage. They were, in fact, no extraordinary occurrence, (fol. 304). At that hour, 3 P. M., the log says: "*strong* gale, with heavy squalls of wind and rain." The officer describes it as a "strong breeze." It is, of course, frivolous to argue that for a winter voyage from Porto Rico to New York, cargo ought not to be so stowed as to resist "heavy squalls" and strong gales, and, as we have seen, one of the witnesses for the defense says, and truly, that it ought to be secure against anything short of a hurricane. There was, therefore, no foundation in the evidence for a ruling that the burden of proof had shifted from the claimants to the libellants, and it is hardly permissible to suppose that the Court so intended to hold. The real root of the error lies in the assumption that there was an issue to be tried between the libellants and the charterers, in which the burden of proof was on the libellants to establish bad stowage, when in fact there was no such issue at all.

IV.—Again, what is to be said of the deadly fact that the casks were adrift and moving about at starting from Porto Rico; indeed on the very night succeeding the loading?

The opinion contains the remarkable observation that: "*This fact does not seem of especial significance.*" But can a fact of more decisive and fatal significance be conceived of? With that fact admitted is it not plain that no amount of evidence could make out a defense for the ship? It is not strange then that none was attempted. Something

has already been said concerning this ruling in the petition; it is opposed to right, reason and all authority, but it is the keynote of the decision.

Third.—*The supposed sea peril.*

I.—It is said in the opinion: "This storm appears both from the account given at the time, before the extent of the damage to cargo was known, and from the effect upon the vessel itself to have been sufficiently severe and violent to create the injury to cargo although sufficiently chocked and fastened to resist storms which might be reasonably anticipated."

In the first place it is to be observed that the damage to cargo originated when it went adrift in what the log calls a "strong gale," and the officers a "strong breeze," on the afternoon of February 22d. There is not a word of evidence tending to show that on this occasion the ship or its furniture received any damage whatever. All the witnesses agree that the "list" was caused not by the "gale," but by the shifting of cargo. Later on, the weather becoming "*roughish*," as the chief engineer says, deck cargo that had broken loose in consequence of the list in moving about caused some slight damage to things on deck.

II.—How far this evidence is from making out a case of *vis major* or exculpating sea peril, the following authorities show:

I.—In the case of the *Morrison* (*supra*), it is said: "It was for them to show affirmatively the safety of the cap and plate. * * * We do not understand from the findings that the severity of the weather encountered by the *Morrison* was anything more than was to be expected *upon a voyage such as*

this down that coast (Weymouth, Mass., to Savannah) and in the *winter season*, or that she was subjected to any greater danger than a vessel heavily loaded and with a hard cargo *might have anticipated*" (pp. 211, 212).

Judge Hoffman, in the case of the Ship *Compta*, 4 Sawyer, p. 376 *et seq.*, says:

"The defense set up in the answer is 'perils of the sea.' It is contended that the vessel, during the voyage, encountered such violent gales and heavy seas 'as to strain and damage her, thereby causing her decks to leak and admit water to the cargo.' In proof of these allegations, the claimants produced the log book and the protest of the master, supported by the suppletory oaths of the latter and the two mates. The log book shows that the ship experienced weather of very considerable severity. On the 28th of October the log book notes, 'Terrific squalls of wind and rain, high, confused sea, flooding the decks at times.' On the 27th of November it notes, 'Eight A. M., frightful sea, with terrific squalls, with hail and rain, flooding decks fore and aft; noon, squalls taking off, but still a heavy sea.' The decks appear to have been very frequently flooded, and 'high, confused seas, heavy seas, heavy swells,' are constantly mentioned. On four occasions the record notes, 'Heavy head sea, causing ship to pitch hard'; 'heavy head sea, ship pitching heavily'; 'heavy head sea, causing ship to go bows under.' 'Ship driving heavily.' *But it is to be observed that the log book nowhere records any serious disaster to the ship, unless the springing of the head of the mizzen-topgallant must be so considered.* Some sails were split on one or two occasions, and some halliards and sheets were parted, *but the hull of the ship seems to have sustained no damage whatever.* She is once or twice mentioned as 'rolling heavily,' but throughout the voyage she is not spoken of as 'straining' or 'laboring' in the seas. On the thirteenth of December, when the log book states that a heavy head sea caused the 'ship to go bows under, filling decks fore and aft,' she appears to have been under topgallant sails, and the entry contains the note, 'Ship behaving well.' On the third day, when she is mentioned as driving heavily, she seems to have been under all sail. These facts tend to corroborate the suggestion of some of the experts, that much of the flooding of the decks may have been caused by her having been driven against head seas, under too much canvas.

"The squalls she experienced, *though frequent and severe*, appear to have been of short duration. Only twice during the

voyage does she seem to have encountered what the log book mentions as a 'strong gale.' But *the most significant circumstance is the fact that the ship was compelled by stress of weather to heave to only twice during the entire voyage, and then only for a few hours. This fact seems of itself sufficient to show that the voyage could not have been of extraordinary severity.* (The *Centurion* did not heave to or slacken speed.)

"From the foregoing it may, I think, reasonably be concluded that the weather experienced by the vessel was such as *might possibly* have produced on a staunch and seaworthy ship the effects attributed to it by the claimants. But that it was not of such unusual and extreme severity as to justify the assumption, without further evidence, that it caused the leaks which occasioned the damage. The carrier, to make good his defense, is bound to show that the damage arose from a sea peril.

"It is not enough for him to show that it might have arisen from that cause. He must prove that it did. This proof can be afforded either by showing a sea peril of such a character that injury to the vessel, however staunch and seaworthy, would be its natural and necessary consequence; or, by the direct testimony of those who *observed its effect upon the ship;* or, by proving her condition on her arrival; or, *he may exclude every other hypothesis of causation by satisfactory proof that she was tight, staunch and seaworthy at the commencement of the voyage.* The proofs fail to show sea perils of the kind first above referred to. The log book shows weather of some severity, *but not greater than is usually encountered on similar voyages;* no proof of the second kind above mentioned is offered."

III.—The weather on the voyage at its worst is described only as "*roughish.*" It is needless to say that much worse weather on a voyage to New York from Porto Rico in February should have been anticipated and provided for. The ship was at no time hove to, nor did she slacken speed for one moment before the squall and shifting of cargo.

IV.—Moreover, as already pointed out in the petition, casks in No. 3 did not move. A witness says that no reason can be given why those in No. 2 should not have been equally secured from shifting (fol. 757), nor was any reason assigned. The law comes to its own conclusion; it is, that those in

No. 2 were not properly secured; this, it says, is the "fair inference."

The *Burgundia*, 29 Fed. Rep., 607.
Marx *v.* The *Britannia*, 34 Fed. Rep., 906.

Fourth.—*The stowing of the molasses over the sugar.*

I.—The case of the American Sugar Refining Company has features peculiar to itself. The master denounced the stowing of the molasses over the sugar as improper at the time. It could just as well have been put by itself in the lower hold which was narrower and safer, and where, if casks broke, no damage would be done to other cargo; but if any broke in the between decks, it must necessarily run down the scupper holes upon the sugar below, as in fact it did.

II.—The authorities conclusively show, that it was culpable negligence to stow the molasses above the sugar, and that this libellant would be entitled to recover on that ground alone.

In Joliet S. S. Co. *v.* Yeaton, 29 Fed. Rep., 331, casks of molasses were stowed over bacon. The leakage from the molasses injured the bacon. The vessel paid the loss and sued the stevedore. The Court said: "Leakage is a necessary incident to the transportation of hogsheads of molasses, and damage from that cause to the bacon stowed below molasses would be a natural result of such stowage. If, then, the defendant, as being the stevedore who undertook the stowing of the cargo is responsible for the placing of those hogsheads of molasses over the bacon, I am unable to see any way of escape for him from liability for the damage that resulted."

It was held that the stevedore acted under the direction of the shipowner, and that as between them the latter was liable.

In Braker *v.* The *Gloaming*, 46 Fed. Rep., 571, casks of cocoanut oil were stowed with plumbago. It was held that even if leakage was due to perils of the sea it was negligence to stow both on the same deck without taking measures to protect the plumbago from the probable leakage of the oil.

In Braker *v.* The *H. G. Johnson*, 48 Fed. Rep., 696, the cargo was well stowed except for the fact that oil was stowed over plumbago. The damage was traceable to unfit casks or improper stowing of such casks over plumbago or lack of suitable attention to leakage through the deck or in the hold during the voyage. It was held that the vessel was liable.

The *Dunbritton*, 64 Fed. Rep., 764, was another case of cocoanut oil above plumbago. It appeared that between-decks was perfectly tight, and that no oil leaked through. Through perils of the sea the casks of oil leaked, the ventilators were broken and the oil was washed by water which the vessel shipped against the plumbago. Notwithstanding the fact that it was customary to carry oil and plumbago in the same ship, it was said that it would have been negligence to stow the oil over the plumbago, had not the between-decks been perfectly tight. The vessel was excused, as the damage was not due to the stowage of the oil over the plumbago, but to the water coming through the broken ventilators.

III.—Kindred illustrations are found in cases of stowage of different cargoes, hostile in character, in proximity, so that an accident to one *may* cause damage to the other. Of such cases the following are examples:

On a voyage from Messina filberts in bags were stowed against a movable wooden bulkhead separating the compartment from the coal bunkers, through

which an extraordinary amount of coal dust penetrated and injured the nuts. The bulkhead was covered by Chinese matting, which is often used for such purposes; but canvas is equally used and is better because tighter. Held that damage from coal dust is not a sea peril, and that the ship was liable for the damage for not using canvas as the best protection as well as for putting the bags next to the bulkhead instead of other cargo less liable to be injured.

Hills *et al. v.* Mackill *et al.*, 36 Fed. Rep., p. 702.

"It is negligence in a vessel to stow bags of rape seed over chalk in the hold of a vessel, in view of the certainty of damage to the chalk in case the bags of seed should be broken."

The *Bitterne*, 35 Fed. Rep., 927.

"It is bad stowage to place salt over iron and anvils, though crates of crockery be placed between them, and to place the salt, iron and crates within an inch or so of the mast. Where the cargo is thus stowed, even though a rent in the mast coat, by which water went into the hold, causing the iron and anvils to rust, was a peril of the sea, the carrier is liable for the injury."

The *Nith*, 36 Fed. Rep., p. 383.

The ship must at its peril in both classes of cases protect against the "possibility" of damage from such stowage.

IV.—In this case, on a voyage from the West Indies in winter, up a coast where mighty storms are known to rage perpetually at that season, the molasses was stowed *over the sugar* in an untried hold, that had never carried liquid and was known *not* to be tight (pp. 209, 210, 211). "Maloney (the supercargo), knew the between-decks were not tight" (fols. 608, 609).

There were yawning scupper holes, to mention nothing else.

The point is whether *the ship* (not Maloney) had legal warrant for assuming as against this libellant (*a*) that the casks would not leak, move, break or spill their contents; (*b*) that if the casks did break and run down the scupper holes into the bilges it would not reach the sugar; (*c*) that the bilges would not become clogged, that the pumps would work efficiently and protect the sugar against the flowing molasses? If the ship might lawfully act on these assumptions and go free if they turn out to be wrong, then of course the sugar has no right to complain that the molasses was stowed above it and caused its ruin. *But can it be seriously maintained that the ship had a right to act on any such presumptions?*

It is submitted, then, that this libellant is entitled to recover upon the special and admitted facts of its own case.

Fifth.—After the decision of the Circuit Court of Appeals the libellants applied to that Court for a stay of the mandate pending this application for a *certiorari*. The stay was denied, but it was remitted to the District Judge to exercise his discretion as to staying execution. The following is the opinion of the District Judge on that application:

UNITED STATES DISTRICT COURT.

THE "CENTURION."

BROWN, *J.*—A note from Judge Shipman states that the Court of Appeals in deciding the motion for a stay, referred only to the issuing of the mandate.

The questions of seaworthiness, sea perils and

burden of proof involve questions of law of great practical consequence.

The proof of bad stowage at the start was in this case conclusive.

The charterer claims that that fault was afterwards repaired, but it was followed by the natural consequence of shifting in a storm of no unusual severity in winter and by a lurch, throwing the ship on her beam ends in only roughish weather when the ship had not been compelled to slacken speed and in circumstances when a ship is not thrown on her beam ends, if in a seaworthy condition of stowage. It is a pretty important question of law whether such uncontrovertible facts are outweighed in legal force and effect by the general testimony of interested persons, that the stowage was good; or, after being bad, was made good by endeavoring to repair it, testimony, after all, to opinion quite as much as to fact, and that, too, contrary to the judgment of the ship's officers. I think there is sufficient ground to stay execution upon the mandate until application can be made to the Supreme Court for a writ of *certiorari*, as desired by the libellant.

A. B.

Aug. 14/95.

Sixth.—Finally, it is respectfully submitted that there is manifest error in the decision that is subversive of fundamental rules of law of carriage by sea, and that the writ of *certiorari* should issue.

W. W. MacFarland,
Of Counsel for Libellants.

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Office Supreme Court, U. S.
FILED.
OCT 14 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

IN THE MATTER OF THE PETITION

OF

JOSÉ BREGARO AND THE AMERICAN SUGAR REFINING COMPANY FOR A WRIT OF CERTIORARI IN THE SUITS OF JOSÉ BREGARO

AGAINST

THE STEAMSHIP "CENTURION" (THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY IMPLEADED),

AND

THE AMERICAN SUGAR REFINING COMPANY

AGAINST

THE SAME.

BRIEF FOR "CENTURION" IN OPPOSITION.

CONVERS & KIRLIN,
Proctors for "CENTURION,"
5 Beekman Street, New York.

J. PARKER KIRLIN,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. .

José Bregaro

against

The Steamship "Centurion."
(The New York and Porto Rico Steamship Company, impleaded.)

The American Sugar Refining Company

against

The Same.

Brief for *Centurion*, in Opposition to Petition for Writ of *Certiorari*.

It is inadmissible to suppose the learned counsel for the petitioners has designedly based his application in these cases upon erroneous statements of the evidence; faults of statement, if shown, must be ascribed to faulty reading or recollection of the record. An examination of the petition and the brief discloses in both, as we read the record, errors of statement regarding the issues raised by the pleadings, the evidence adduced by the respect-

ive parties thereunder, and the course and conduct of the litigation. We must, therefore, first point out these errors, and after eliminating them (if shown), consider whether anything is left in the case upon which there could possibly be a divergence of view between this Court and the Court of Appeals, except bare questions of fact. If only questions of fact are involved, it is assumed the case would not be one for the writ.

POINTS

I.

Libelant's application is largely based, both in the petition and the brief, upon erroneous statements and inferences of fact.

1. In the sixth paragraph of the petition (fol. 23) it is said:

"But in the Court of Appeals these two proceedings, having no relation whatever to each other, were confounded and treated as a single cause; the libelants were expressly regarded as parties to the issues raised between the claimants and the charterers upon the petition and answer; their rights were identified with the claimants', and they were treated as parties to the petition along with the claimants."

The passage, in the opinion of the Court, upon which this statement is predicated, reads:

"It must be recollected that the case against the charterer derives no additional strength from the fact that the controversy was *tri partite*. The burden of proof is still upon the cargo-owner or the shipowner to establish the fact that the injury was caused by improper stowage, and this burden has, in our opinion, been imperfectly borne."

If this passage be read in connection with the discussion in the opinion, it will be seen that the Court was considering the weight of the evidence as be-

tween the three parties, and where the burden of proof lay as between all. The ship, having been sued upon an allegation of improper stowage, brought in the charterer whose servant stowed the cargo; and denying, both in his answer to the libel and in the petition, that there was any negligence in or about the stowage, claimed, nevertheless, that the alleged negligence, if proved, would be negligence by the charterer, and that, therefore, if negligence were established, the charterer should pay the decree. As the case was thus of an equitable nature, and all parties were before the Court, it would have been an obvious injustice to permit the libelants to recover against the ship, because the burden of proof was on the ship and it had not sustained such burden, and yet permit the charterer to escape, because the burden was on the ship as against it also, and not sustained, while all the time the negligence, upon which alone any recovery could be predicated, would be the negligence of the charterer in stowage. Therefore, when the Court found that perils of the sea fairly sufficient to account for the damage had been shown, and the weight of the evidence disclosed that the cargo had been well stowed, in the usual way, at the loading ports in Porto Rico, the question recurred as to the burden of proof. The libelant was suing the ship; the ship was suing the charterer. In this stage and posture of the case, the Court said:

"The burden of proof is still upon the cargo owner or the shipowner, to establish the fact that the injury was caused by improper stowage,"

meaning as we conceive,

"the burden of proof is still upon the cargo-owner [as between him and the shipowner] or the shipowner [as between him and the charterer] to establish the fact that the injury was caused by improper stowage."

The general discussion, in the opinion of the Circuit Court of Appeals, clearly shows that they nowhere intended to say or did say that there was any burden of proof on the cargo-owner to prove negligence on the part of the charterer. All they meant to say and did say upon the fair reading of their opinion was, that after proof of usual good stowage and of perils fairly sufficient to ac-

count for the damage was adduced by the defense, the burden of proof was shifted back upon the libelants to rebut this evidence by giving affirmative proof that the stowage was not good or that some other negligence contributed to the loss, which should deprive the vessel of the benefit of the exception contained in the bill of lading.

2. In the 7th paragraph of the petition (fol. 27), it is said:

"The ground of the decision of the Court of Appeals is that the loss was caused by the ship encountering a storm of uncommon violence; *but there is no averment to this effect in the claimant's answer and no such defense is set up,* and as will be seen, all the claimant's witnesses denied that bad weather was the cause of the loss, and attributed it to bad stowage."

As to the first part of this allegation, that no defense of perils of the sea was set up, it is sufficient to point to the libel (paragraph 2 on the 3d page of the record), where it was alleged that the damage to the molasses arose "*without encountering any unusual or extraordinary weather*," and to the denial of that allegation in the second article of the answer (record, p. 10, fol. 28), as well as the affirmative allegation at the same place that the loss arose "*owing to perils encountered on the voyage.*"

In the eighth article of their answer, the claimants affirmatively set up the exemptions contained in the bill of lading, which include, amongst others, "*perils of the seas.*"

It is noticeable that no citation from the record is given to support the second branch of the allegation, that "all the claimant's witnesses denied that bad weather was the cause of the loss, and attributed it to bad stowage." At no place in the record did the claimant's witnesses ever deny that bad weather was the cause of the loss. At no place in the record did they say it was caused by bad stowage. On the contrary, it will be seen that by the entries in the log put in on consent, and by the evidence of the witnesses first examined (Capt. Watson, beginning at p. 27; Chastney, chief officer, beginning at p. 59; Murray, chief

engineer, beginning at p. 107), emphasis was at once laid upon the strong gale and heavy lurch which the ship experienced on February 22, as the explanation of this damage (fols. 205, 271, 294, 320, 334, 605, 395, 701, 308, 99).

The criticisms made by the officers upon the stowage of the cargo related, with a single exception, to the place, and not the manner, of stowage, namely, to putting molasses in the 'tween-decks, instead of in the lower hold. None of them, however, had ever carried molasses before, and the only evidence as to the customary stowage of molasses was furnished by the charterers. Like all the other evidences, however, this was introduced in the cause generally, and had its bearing upon the rights of all the parties. It tended to show that stowage of cargo in the 'tween decks—the latter being tight—was the practice in Porto Rico. The District Judge, indeed, appears not to have raised a complaint upon any impropriety in the place of stowage. That this deck was so tight that no molasses went through it, was shown by the result—that there was no damage underneath the deck, but only in the bottom, to which part of the ship it had escaped through the usual and ordinary scuppers provided and kept open to take off the customary drainage. The single exception referred to relates to the criticism of one of the officers, that the molasses was not properly chocked. His evidence was based upon his English teaching that chocks should be triangular instead of square pieces of wood (fol. 727), while the usual dunnage in Porto Rico appears to be square or irregular wood.

3. In petitioner's brief (p. 6) it is stated:

"The claimants said and insisted that the stowage was bad in the beginning."

What are the facts as to this?

In the second article of the libel in both cases bad stowage was alleged (fols. 8, 47).

The answer in each case denied the allegation (fols. 28, 67–70).

The petitions in both cases distinctly denied any negligence in stowage (fols. 16–17, 57).

4. In paragraph seven of the petition (fol. 29) it is said:

"The answer of the charterers to the petition of the claimant does not intimate that the loss was due to a peril of the sea, but alleges that it was owing to the unfitness of the ship, and the misconduct of the master and officers. Indeed, no one claimed or pretended, even in their pleadings, much less in their proofs, that the damage to the cargo was due to the violence of the storm encountered."

The claimant's pleading on this point has been referred to. The charterers' answer to the petition in the molasses case alleged that "during the voyage in question said steamship *encountered unusual and heavy weather, whereby certain of said hogsheads were broken and damaged*," &c. Their omission to plead perils of the sea as the proximate cause of the loss to the sugar apparently arose from their failure to appreciate that if the damage to the molasses was a sea peril loss, the damage to the sugar would be a like loss, if it was found the sugar and molasses were both well stowed and in the usual juxtaposition to each other. Their answer in the molasses case gave sufficient notice that they considered perils of the sea the proximate cause of the breaking away of the molasses, which was the real disaster.

The latter phrase of the quoted paragraph of the petition, alleging that no one claimed or pretended, even in the pleadings, much less in the proofs, that the damage to the cargo was due to the violence of the storm encountered, is wholly at variance with the actual fact, and as the Court will observe, is not supported by any reference to the record.

5. In the eighth paragraph of the petition (bottom of page 11) it is said:

"This was not uncommon weather for any season of the year, and could not have sent the molasses adrift if properly stowed, but, in fact, the molasses went adrift as soon as the ship moved after it had been put on board, and *was adrift all the way from Porto Rico*."

The first part of this allegation will be dealt with at another point in the argument; but we remark here that the defense of perils of the sea was not based upon the general character of the weather during the voyage or the general character of the voyage itself, but upon the strong gale and heavy, unusual and extraordinary lurch experienced at a particular time, to wit, February 22d, in the afternoon.

The latter part of the statement, that the molasses went adrift as soon as the ship moved, after it had been put on board, and *was adrift all the way from Porto Rico*, is wholly and absolutely unsupported by the reference quoted in support of it (to which reference is respectfully made), or by any other evidence in the case.

The molasses was taken aboard at the port of Ponce, Porto Rico (Claimant's Exhibit 3, p. 326, fol. 238). While it was going in the ship, the second mate was not satisfied with the way it was being secured in the wing (fols. 712, 723). The chief officer then appears to have gone down with Maloney, the charterers' supercargo, and made an examination, the result of which was that Maloney sent some men down and put more wood in behind the casks that night. The night after his attention was called about it, "we shifted from one port to another, and the casks were moving about like that so that the next morning we told him about it again, and he sent his men down to secure it again.

"Q. *And it was secured, wasn't it?* A. *Yes, sir*" (fol. 725).

As the molasses was taken in at Ponce (fol. 238), and as the order in which the steamer took the ports was from Ponce to Humacao, February 9, to February 10 (see log, Record, pp. 63, 64), it is evident that the movement of the casks referred to was during that short transit, and that at Humacao the casks were firmly and finally secured.

After that the vessel *loaded cargo at seven other ports*, before she sailed finally for New York on February 18th (Log, pp. 61, 67), and there was not so much as a whisper in the testimony that the molasses ever moved after it was

secured at Humacao—much less that "it was adrift all the way from Porto Rico."

The question that was put to the witness immediately after that last quoted, was put by the libelants' counsel as follows:

"But it broke away, didn't it, *in the weather*" (referring apparently to the storm, which had been the subject of examination)? To which the witness answered, that it did, and that some of the casks broke away entirely and got smashed to pieces.

Thus it is seen the most important fact charged in the petition, that the casks were adrift on starting upon the voyage from Porto Rico to New York, and remained adrift all the way, is contrary to the proofs.

6. In the same paragraph of the petition (at fol. 36) it is stated:

"The decisive point is then made by the claimant's own witnesses that the casks were adrift at the starting of the voyage, and *necessarily remained so*."

The whole of the evidence on that point has just been cited.

It is distinctly said that they did not remain adrift, but were secured at Humacao. The argument that they must have remained adrift is based upon the statement in the record (fol. 299) that the casks which first got adrift *in the storm* were those next the engine-room bulkhead. Reading that passage of the evidence, in conjunction with the previous line of examination, shows this clearly. The witness not only made no reference to the slight movement of the cargo between Ponce and Humacao, but apparently was wholly ignorant of that event.

There is not a word in the record to show just which of the casks were moving, from Ponce to Humacao. In the nature of things they must have been top casks, or casks that were in such position that they could be secured, as the evidence shows they *were secured* (fol. 725). It is a fair inference that the officers would not have proceeded to sea with the ship having her 'tween-decks stowed full of

casks of molasses, knowing or believing that any of the casks were moving about when the voyage was begun.

7. Further (at fols. 36, 37 of the petition) it is said:

"We have seen that the cargo had been adrift all *the way from Porto Rico*, the wind and sea merely increasing the attrition of the casks, and they broke, spilling their contents and giving the ship a list."

Again, no citation in the record is given supporting this proposition. We know of nothing in the record to support it.

8. In the 10th paragraph of the petition it is said:

"The claimant having failed to allege or even attempt to prove extraordinary violence of storm and severity of weather as a defense, nothing remained for the libelants to do; *the claimant in effect submitted to a decree.*"

No statement could be more misleading or erroneous. Attention has already been called to our pleadings and our proof. In our brief in the District Court our first argument was that—

"The evidence offered by the respondents showed that the cargo was stowed and dunnaged in the usual way all cargoes of this mixed character shipped at Porto Rico are stowed, and that on the voyage sea perils were experienced, to which the shifting of the cargo is fairly ascribable."

In the Circuit Court of Appeals our first point and our chief argument was:

"The losses in both cases should be ascribed to perils of the sea."

We must also take serious exception to the statement (at fol. 43 of the petition) that the claimant did not attempt to make out a clear *prima facie* case of loss from *vis-major* as an unwarranted comment on the course of the litigation.

9. At folio 46 of the petition, the statement is again reiterated that the casks were not secured after their first movement between Ponce and Humacao, and that they could not be, because those which had been moving were adjacent to the bulkhead. The references cited for this proposition (fols. 299, 377, 383, 725) do not support the statement. They speak only of movement *in the storm*. The only evidence in the case on this point showed that the casks which had been moving between Ponce and Humacao were secured; and it does not appear that such casks had been adjacent to the bulkhead, nor that if they had been, there was not room from the top to secure them. As this movement was evidently trifling in extent, and was stopped to the satisfaction of the officers by further securing of the casks, and there was no further movement of the casks until the storm was encountered, the Court of Appeals very naturally remarked that the fact of a slight movement between Ponce and Humacao did not seem of special significance.

An argument tending to show that the stowage must have been and continued bad, is sought to be derived from the circumstances that in the lurch the molasses stowed in No. 2 'tween decks got adrift from the smashing of some of the casks (which thus caused the whole of the tier to shift), while the casks in the No. 3 'tween decks did not carry away. But as pointed out in the charterers' brief (p. 12), this was really due to the fact that there was a row of stanchions fore and aft amidships of the No. 3 deck, which took the weight of half of the tier of hogsheads. In other words, assuming 20 casks to the tier on the No. 3 'tween-deck, the stanchions would divide the tier, so that the cask next the stanchion would have only to support the weight of 10 casks in the heavy lurch, while in the No. 2 hatch the end cask had to support the weight of 20. It is apparent that in the lurch by which the ship was heeled over to an angle of 45 degrees, the weight of 19 casks would be more than sufficient to crush the twentieth, which was partly empty, from loss of molasses through fermentation.

10. At folio 53 of the petition it is said:

"As to stowing the molasses over the sugar, the master expressly condemned it, and the authorities universally condemn the stowing of liquids over solids under such circumstances; it was never approved in any case."

It has already been pointed out that the master had never carried molasses in a tight between-deck before, and that his criticism (which the Court of Appeals inferred was partly due to criticism of his conduct and ship), related to the place rather than the manner of stowage, while all the other proofs in the case showed that it was usual to carry molasses in the 'tween-decks, and that no objection arises to that mode of stowage, based upon its likelihood of dripping down on the cargo below. Libelants produced no evidence that this was not the usual and customary way to stow Porto Rico cargoes consisting in part of sugar and in part of molasses, while the only evidence in the case, of those experienced in this class of cargoes, was the other way.

It is noticeable that no authorities are cited, condemning stowage of liquids over solids under such circumstances, while the statement that "it was never approved in any case" will be seen to be incorrect by the cases below referred to.

The general statement that it is bad stowage to stow liquids over solids took form in the time of sail vessels and vessels which had wooden 'tween-decks, not calked or water tight. Most of the cases, indeed, refer to instances of stowage of wet over dry in the same compartment. It is obvious that the reasons which held said stowage bad, when combined in the same hold, or when the liquids were put upon a wooden 'tween-decks not tight, have no application to stowage of liquids in modern steel vessels, where the 'tween-decks, like the top, is of calked steel and tight, with the exception of the hatches and feeder holes. In the present case these latter were all tight, as pointed out in charterer's brief (*bottom page* 4; *top of page* 5); and there was no damage to the top cargo underneath the 'tween decks.

Many recent cases and the now customary practice have justified the stowage of liquids in the 'tween-decks, where it is tight, above dry cargo in the lower hold.

The *Etona*, 64 Fed. Rep., 880.
The *Dunbritton*, 61 Fed. Rep., 764.

In *Lawrence* v. *Minturn*, 17 How., 115, it was said that "the master is *bound to use due diligence in stowing and staying the cargo, but there is no absolute warranty that what is done shall prove sufficient.*"

It seems to be settled, at least in the lower courts, that where, as here, the proof tends to show stowage of cargo in the way usually and customarily adopted at the port where it is laden by competent and qualified stevedores, this is a fulfillment of the owners' obligation as to stowage.

Baxter v. *Leland*, 1 Blatchf., 526.
The *Dan*, 40 Fed. Rep., 691.
The *G. R. Booth*, 64 Fed. Rep., 878.
The *Dunbritton*, 61 Fed. Rep., 764.
The *Etona*, 64 Fed. Rep., 880.

II.

Correcting the errors above referred to in libelants' application, it appears there is virtually no question of law in this case, but only questions of fact.

This is distinctly so found in the opinion of the Circuit Court of Appeals, where it is stated that "*our examination of the record has led us to conclusions of fact which differ from those of the District Judge*" (fol. 1165). "*The case then rests upon the conclusion to which the trier may come as to the extent of the peril.*" The District Court was of opinion that it was insufficient to cause properly stowed cargo to break loose, and therefore the stowage must have been insufficient. We are constrained to the opinion that the stowage was affirmatively proved

to have been proper; that the peril was sufficient to create and did create the damage to a properly stowed cargo, and therefore the liability of the ship and her owners was within an exception in the bill of lading."

These statements, coupled with the absence of discussion on any law point in the opinion of the Circuit Court of Appeals, shows that the Court considered the controversy between the parties related solely to questions of fact.

The only suggestion of a law point in the case relates to the way the Court of Appeals viewed the burden of proof.

III.

The Circuit Court of Appeals dealt rightly with the burden of proof.

All the evidence (which was by deposition) was taken in the case after the charterer was vouched in. The depositions were entitled in all the cases, the witnesses were examined and cross-examined by counsel for the three parties, and the evidence taken was treated as evidence in the cause upon all the issues between all the parties, so far as relevant and material. Obviously, therefore, the evidence of good and usual stowage adduced by the respondent (charterer) was in the case for all purposes and was evidence for the shipowner as against the libelants, as well as for the charterer against the shipowner.

This incident of the mode of trial appears to be lost sight of in libelant's application, where it is frequently remarked that the claimant's evidence did not show this or that, or that the claimant's witnesses stated thus or so, or did not deny thus or so. After the evidence was all in and its gross weight considered, the Court found it established, as between all the parties, that the stowage was good and was done in the usual and customary mode adopted at the port of loading, and that the sugar and molasses were stowed in the usual relation to each other. It was also

found that the stowage remained good until after the lurch and gale were experienced on the 22d of February, and that that peril was fairly sufficient to and did account for the breakage of the casks and the consequent damage both to molasses and sugar. On such findings it is too well settled for controversy that the burden of proof becomes shifted back upon the shipper to establish bad stowage by affirmative proof.

This rule is stated by Judge CHOATE as follows:

"If the cargo is delivered in a damaged condition the burden is on the ship to show that the case comes within the exception contained in the bill of lading. If then the ship shows that it has encountered a sea peril to which the injury can be properly attributed, and that peril is shown to have been adequate to produce the injury, and it does not appear that there were at the command of the master sufficient means to overcome the peril or prevent the damage likely to result therefrom to the cargo, then the ship will be held to have made out a *prima facie* defense, and it will be incumbent on the libelants to produce further evidence of negligence."

The *Brig Sloga*, 10 Benedict, 315, at p. 326.
Clark v. *Barnwell*, 12 How., 272, 280, 282.
Transportation Co. v. *Downer*, 11 Wall., 129, 133.
The *Polynesia*, 30 Fed. Rep., 210.
The *Guy C. Goss*, 53 Fed. Rep., 839.
The *New Orleans*, 26 Fed. Rep., 44.
The *Norway*, Br. & Lush., 404, 408.
The *Glendarroch*, 1894 Prob., 226.

The Court of Appeals might have gone further and held that as on libelants' contention it was doubtful whether the loss should be ascribed to perils of the sea or to improper stowage [at most it would be doubtful on libelants' showing, as they have no evidence of bad stowage, but depend upon inferences merely], they did not clearly establish the negligence and so cannot recover.

Clark vs. *Barnwell*, 12 How., 272, 280.
Muddle vs. *Stride*, 9 C. & P., 380, 383.
The *R. D. Bibber*, 8 U. S. App., 42, 47.

IV.

Under another exception in the bill of lading not referred to in the opinion of the Circuit Court of Appeals, the burden of proof was plainly on the libelants.

The exception referred to is that of "leakage and breakage and damage from said causes."

The exemption of leakage covers the loss of the whole contents of the casks.

The *Helene*, Br. & Lush., 429.

This exception was appropriate to cover the loss to the molasses and to the sugar. The exception being apt and specific, relieves the shipowner from liability unless the libelants show affirmatively that some contributing negligence on the part of the ship deprives her of the benefit of the exception.

Transportation Co. vs. *Downer*, 11 Wall., 129, 133, 134, 135.
Clark vs. *Barnwell*, 12 How., 272, 280, 282.
The *Glendarroch*, 1894 Prob., 226.
The *Norway*, Br. & Lush., 404, 407, 408.
Phillips vs. *Clark*, 2 C. B. & S., 156.
Wild vs. *Pickford*, 8 M. & W., 442, 459.
The *G. R. Booth*, 64 Fed., 878.

The mere fact of leakage or breakage is not of itself evidence of negligence, where the proofs show that sea perils fairly sufficient to account for the loss have been encountered on the voyage.

Craig v. *Delargy*, 16 Scottish Law Reporter, 750.
Dobbie v. *Williams*, 31 *Idem.*, 667.
The *Polynesia*, 30 Fed., 210.
Roth v. *Hamburg-Amer. Packet Co.*, 59 Sup. Court Rep. (Jones and Spencer, N. Y.), 49.

The authorities thus hold that where damage is *prima facie* within the exception to the bill of lading, the burden of proof becomes shifted upon the libelant to show by affirmative proof some negligence disentitling the vessel to the benefit of the exception.

It does not sustain that burden by simply invoking presumptions or relying upon inferences or conjectures. Thus, in the *Norway* (*supra*) (a case of stranding), at page 408, the Court said:

"And it seems to us impossible to affirm with reasonable certainty that such a vessel so navigated might not have grounded from some cause which reasonable skill and prudence on the part of the pilot could not prevent; the plaintiff was bound to prove affirmatively, and not merely by way of conjecture, that the vessel grounded by reason of the pilot's want of skill or want of care, and we find no such proof in the evidence he has adduced."

To the same effect:

Transportation Co. vs. *Downer*, 11 Wall., at p. 129.

The *Glendarroch*, 1894, Probate, at p. 231.

The libelants having offered no affirmative proof in this case, but having relied wholly upon conjectures at variance with the evidence adduced by the other parties, were rightly held to have failed in sustaining the burden which the law imposed upon them.

V

The Circuit Court of Appeals properly ascribed the damage, both to the molasses and to the sugar, to perils of the sea.

Finding, as it did, that the cargo had been properly stowed and dunnaged, and that it shifted and became broken at the very time of the lurch in the gale of the 22d

of February, no other conclusion than that the loss was a sea peril loss was open to the Court.

Damage to cargo resulting from the rolling or pitching of a ship in heavy weather is an ordinary instance of loss by perils of the sea.

Lawrence v. *Aberdein*, 5 B. & A. Ed., 107.
Gabay v. *Lloyd*, 3 B. & C., 793.
The *Alexandra*, 14 Law Times Reports, 744.
The *Catharine Chalmers*, 32 Law Times Reports, 847; 2 Aspinall, N. S., 598.

The loss and escape of the molasses being a loss by sea perils, the damage it did to other cargo, with which by custom it was commonly stowed, would also be a loss by sea perils.

Montoya v. *London Assurance*, 6 Excheq., 451.

In that case sea water entered the ship's holds by reason of sea perils, and damaged certain hides. A fetid odor from the hides injured tobacco stowed next to it. Stowage of the two articles in the same compartment was shown to have been usual and customary. It was held that the proximate cause of the damage to the tobacco was sea perils.

It is true that this case was one under a policy of insurance, but it appears to be now settled that the words "sea perils" have the same meaning in bills of lading as in policies of insurance, the only difference being that in the former case the shipowner may be disentitled to the benefit of the exception, if negligence on his part has contributed to the loss.

The *Xantho*, 12 App. Cas., 503.
Hamilton v. *Pandorf*, 12 App. Cas., 518.

The learned District Judge and libelants' counsel lay great stress on the fact that one of the engineers spoke of the *voyage* as "roughish"; that there was evidence show-

ing the weather had been as bad, if not worse, after the 22d of February, when the lurch occurred; and that, taken as a whole, the voyage had not been rougher than some of the witnesses had experienced, both before and afterwards. These might all be true, and yet the gale of the 22d and the lurch, which it clearly appears caused the damage, may fairly be considered a sea peril within the usual and accepted meaning of those words. The weather was certainly severe enough to do the damage complained of. The District Judge says it was not severe enough to cause damage to a properly stowed cargo, and makes a distinction between ordinary and extraordinary perils of the sea. The question, therefore, arises as to the degree or extent of the peril. This is, of course, purely a question of fact, upon which the District Court and the Circuit Court of Appeals reached opposite conclusions.

In the *Catharine Chalmers*, 32 Law Times Reports, 847, the distinction made by the District Judge between ordinary and extraordinary perils of the sea, was urged upon Sir Robert Phillimore by Mr. Webster. The case in many respects resembled the present.

In delivering judgment, Sir *Robert Phillimore* said:

"I am of opinion, upon the evidence before me, which is really, as is commonly said, all on one side, that the damage in this case was caused by the perils of the sea, and I say so after having looked at the entries in the log book. I have no doubt, taking those entries and the evidence of the witnesses, that the right conclusion to come to is that the damage was caused by the perils of the sea. *I am unable to draw the distinction forced upon me between ordinary and extraordinary perils. In truth, it may be said that the way in which the cargo was stored was more or less the cause of the damage; but I am of opinion that the evidence shows that the cargo was stowed in the ordinary way, and if the bad weather had not occurred and the straining had not taken place, the cargo would, I think, have arrived without damage, and consequently the proximate cause of the damage must be taken to have been the perils of the seas.*"

Last Point.

The application for a writ of *certiorari* in these cases should be denied.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for *Centurion*.

J. PARKER KIRLIN,
Of Counsel.

New York, October 10, 1895.